No. 83-2124

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES H. RUTTER AND
MARIE R. RUTTER AND J. H. RUTTER REX
MANUFACTURING COMPANY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that a pretrial order of the Tax Court determining the party upon whom the burden of proof would rest was a final "decision" immediately appealable to the court of appeals under Section 7482(a) of the Internal Revenue Code.

1. Pursuant to Section 534(b) of the Code,[1] the Commissioner notified petitioner J.H. Rutter Rex Manufacturing Company[2] that he planned to issue a notice of deficiency

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2]The corporate petitioner's case in the Tax Court was consolidated with that of James H. and Marie R. Rutter, two of the corporation's principals. The term "petitioner" as used herein refers to the corporation.

that would include an amount with respect to the accumulated earnings tax imposed by Code Section 531. Petitioner timely submitted a statement under Section 534(c) setting forth seven grounds on which it proposed to rely to establish that its earnings "ha[d] not been permitted to accumulate beyond the reasonable needs of the business." The Commissioner subsequently issued a notice of deficiency asserting against petitioner an accumulated earnings tax liability of $446,658 for 1977 and $598,077 for 1978 (Doc. 26).[3]

Petitioner sought redetermination of the deficiency in the Tax Court (Doc. 5). In August 1983, petitioner moved to shift to the Commissioner the burden of proof with respect to the seven grounds enumerated in the statement it had earlier filed (Doc. 14).[4] Following a hearing, the Tax Court issued an order denying petitioner's motion with respect to the first five grounds and granting its motion with respect to the other two (Pet. App. A1-A19). Petitioner filed a notice of appeal from that order (Doc. 28).

The Commissioner moved to dismiss the appeal for lack of jurisdiction, contending that the appeal was interlocutory and was not taken from a final "decision" of the Tax Court (Pet. App. A20-A21). The court of appeals granted

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[3]"Doc." references are to the original documents as numbered by the Clerk of the Tax Court.

[4]Section 534(a)(2) generally provides that if the taxpayer in an accumulated earnings tax case has submitted the statement described in Section 534(c), the burden of proof in the Tax Court shall "be on the Secretary with respect to the grounds set forth in such statement in accordance with the provisions of such subsection." The regulations provide that the burden of proof will not shift to the Commissioner if "the ground or grounds on which the taxpayer relies are not relevant to the [Commissioner's] allegation, or if relevant, the statement does not contain facts sufficient to show the basis thereof." Treas. Reg. § 1.534-2(b)(2).

that motion and dismissed the appeal in an unpublished judgment order (*id.* at A26). A petition for rehearing with suggestion of rehearing en banc was denied on April 6, 1984 (*id.* at A27-A28).

2. Section 7482(a) grants the courts of appeals jurisdiction to review "decisions" of the Tax Court. Section 7459(c) provides that "[a] decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court." Reading these two Sections together, the courts of appeals have generally held that the term "decision" as used in Section 7482(a) refers to two (and only two) types of action by the Tax Court: (1) an order dismissing the proceeding before it for lack of jurisdiction; and (2) an order formally determining the amount of a tax deficiency or the absence thereof. See, *e.g.*, *Porter* v. *Commissioner*, 453 F.2d 1231, 1232 (5th Cir. 1972); *Commissioner* v. *Smith Paper, Inc.*, 222 F.2d 126, 129 (1st Cir. 1955); *Kiker* v. *Commissioner*, 218 F.2d 389, 392 (4th Cir. 1955); *Michael* v. *Commissioner*, 56 F.2d 825 (2d Cir. 1932), cert. denied, 296 U.S. 579 (1935). See also *Wilson* v. *Commissioner*, 564 F.2d 1317, 1318 (9th Cir. 1977), cert. denied, 439 U.S. 832 (1978) (order denying a taxpayer's motion to amend his pleadings is an appealable decision where "[t]he order ha[s] the effect of dismissing the * * * ~~the~~ petition * * * for lack of jurisdiction"); *Commissioner* v. *S. Frieder & Sons*, 228 F.2d 478, 482 (3d Cir. 1955) (Tax Court order striking Commissioner's deficiency claim is an appealable decision where the effect is "to decide that it has no such jurisdiction to redetermine the tax"). Cf. *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351 (1955) (Tax Court order dismissing case on the ground that no renegotiable contract existed was an appealable "decision").

Some courts have expanded the definition of "decision" as used in Section 7482(a) to include a third category of Tax Court orders — those that finally "dispose[] of the entire proceeding before" the Tax Court. *Louisville Builders Supply Co.* v. *Commissioner*, 294 F.2d 333, 339 (6th Cir. 1961). Most of these cases involve orders denying petitions to intervene. *E.g., Sampson* v. *Commissioner*, 710 F.2d 262, 263 (6th Cir. 1983) (per curiam); *Estate of Dixon* v. *Commissioner*, 666 F.2d 386, 388 (9th Cir. 1982); *Estate of Smith* v. *Commissioner*, 638 F.2d 665, 668 (3d Cir. 1981). The courts in these cases noted that a denial of intervention finally disposes of the would-be intervenor's petition, and that review of his claim would not be available upon the taxpayer's appeal of the Tax Court's decision on the merits. *Sampson*, 710 F.2d at 263; *Estate of Smith*, 638 F.2d at 667-668. The courts also noted that an order denying intervention is an appealable "final order" when issued by a federal district court. *Estate of Dixon*, 666 F.2d at 388 (citing cases); *Estate of Smith*, 638 F.2d at 668 (same).

The common thread running through these cases is that an appeal can be taken only from a final decision of the Tax Court. See, *e.g., Estate of Dixon*, 666 F.2d at 388; *Estate of Smith*, 638 F.2d at 668; *Handshoe* v. *Commissioner*, 252 F.2d 328, 329 (4th Cir. 1958) (per curiam). Interlocutory orders of the Tax Court, like those issued by federal district courts, are not subject to immediate appeal. *Estate of Dixon*, 666 F.2d at 388; *Estate of Smith*, 638 F.2d at 668. See *Ryan* v. *Commissioner*, 680 F.2d 324, 326-327 (3d Cir. 1982) (Tax Court order denying motion for summary judgment is not an appealable "decision"); *Licavoli* v. *Commissioner*, 318 F.2d 281, 282 (6th Cir. 1963) (per curiam) (Tax Court order striking certain defenses is not an appealable "decision"); *Ceco Steel Products Corp.* v. *Commissioner*, 150 F.2d 698, 699 (8th Cir. 1945) ("intermediate order governing only the course of procedure before

the Tax Court" is not an appealable "decision"); *Michael*, 56 F.2d at 825 (Tax Court order granting severance motion is not an appealable "decision").[5]

The order of the Tax Court at issue here plainly was not a final "decision" immediately appealable to the court of appeals under the principles outlined above. That order did not establish a deficiency in tax or the absence thereof. It did not dismiss the case for lack of jurisdiction. And it did not in any sense finally dispose of the entire proceeding before the Tax Court. All the order did was determine, prior to a trial on the merits, the allocation as between petitioner and the Commissioner of the burden of proof with respect to the seven factual issues raised by petitioner's Section 534(c) statement. The interlocutory nature of that order could scarcely be plainer. See, *e.g.*, *United States* v. *Margiotta*, 662 F.2d 131, 140 n.23 (2d Cir. 1981) (characterizing as interlocutory and hence nonappealable a ruling whose effect was "merely [to] present the Government with a heavier burden of proof"); *Arnold* v. *United States*, 404 F.2d 953, 958 n.6 (Ct. Cl. 1968) (characterizing as interlocutory a trial commissioner's order respecting burden of proof). This Court noted in *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The Tax Court's burden-of-proof ruling did not have that effect.

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[5]The purpose of restricting appeals to final decisions is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). In this way, courts avoid the fragmentary and piecemeal review that would be caused by a succession of separate appeals from the various rulings to which a litigation may give rise. See *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

3. Accordingly, petitioners err in contending (Pet. 7-11) that the circuits are in conflict, in any way material to this case, about the meaning of the term "decision" as used in Section 7482(a). As we have noted, the courts have generally held that a "decision" of the Tax Court means a decision of the type referred to in Section 7459(c) — viz., an order dismissing the proceeding for lack of jurisdiction or determining the amount of a tax deficiency. Some courts have also held, where they have been required to address the question, that a "decision" may include certain other final orders (such as orders denying motions to intervene) that dispose of the entire proceeding and that would not be reviewable absent an immediate appeal. But the courts have uniformly held that an interlocutory order, which does not dispose of the entire case and which can be reviewed in the normal course upon appeal of the Tax Court's decision on the merits, is not a "decision" subject to immediate review. Since the order at issue here — a pretrial order allocating the burden of proof — was clearly interlocutory, petitioner could not prevail under any of the cases it cites.[6]

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[6]The cited cases (Pet. 7-8) are either inapposite or do not stand for the proposition for which petitioner cites them. As we have noted (see page 4, *supra*), the courts in *Ryan* v. *Commissioner, supra*, and *Licavoli* v. *Commissioner, supra*, held that certain interlocutory orders of the Tax Court were not appealable decisions. The courts in *Wilson* v. *Commissioner, supra*, and *Commissioner* v. *S. Freider & Sons, supra*, held that orders striking certain pleadings were appealable decisions, but only because the orders had the effect of dismissing the case for lack of jurisdiction. The court in *Louisville Builders Supply Co.* v. *Commissioner, supra*, held that an order compelling the taking of a deposition was an appealable decision, but that order was "entered by the Tax Court in a so-called Special Proceeding initiated for the sole purpose of obtaining such order" (294 F.2d at 336), in a situation where a notice of deficiency had not yet been issued. The three other cases petitioner cites (Pet. 7) involve appeals of orders denying motions to intervene.

4. Finally, there is no merit to petitioner's contention (Pet. 16-23) that it will be unfairly prejudiced absent an immediate appeal of the Tax Court's burden-of-proof ruling. "*Every* interlocutory order involves, to some degree, a potential loss or harm." *Ryan* v. *Commissioner*, 517 F.2d 13, 19 (7th Cir.), cert. denied, 423 U.S. 892 (1975) (emphasis in original). But that risk "must be balanced against the need for efficient federal judicial administration, the need for the appellate courts to be free from the harassment of fragmentary and piecemeal review of cases otherwise resulting from a succession of appeals from the various rulings which might arise during the course of litigation" (*ibid.*). Accord, *Borden Co.* v. *Sylk*, 410 F.2d 843, 846 (3d Cir. 1969). Even if the Tax Court erred in allocating the burden of proof, petitioner will suffer no harm if it prevails in its claim that it did not unreasonably accumulate earnings (see *W. W. Windle Co.* v. *Commissioner*, 550 F.2d 43 (1st Cir. 1977)), or if the location of the burden of proof turns out to be irrelevant to the Tax Court's ultimate conclusion (*e.g.*, *Raymond I. Smith, Inc.* v. *Commissioner*, 292 F.2d 470, 474 (9th Cir.), cert. denied, 368 U.S. 948 (1961)).[7] At all events, petitioner's interests can be fully protected by an appeal in the normal course following a final decision by the Tax Court, if that decision is adverse to it.

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[7]Petitioner claims (Pet. 18-19) that, absent an immediate appeal of the burden-of-proof ruling, its effort to "formulate [its] trial evidence and strategy" may be prejudiced or compromised. But this risk is present whenever an interlocutory order (such as an order respecting the introduction of testimony or evidence) is involved. A litigant is often faced with a choice between altering his trial strategy to comply with the trial court's rulings, or standing his ground and presenting his claims to the appellate court following an adverse decision on the merits. But the existence of such a choice does not entitle a party to immediate appeal of interlocutory orders.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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